U.S. Department of Labor

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Issue Date: 17 October 2008

CASE NO.: 2008-NTS-00001

In the Matter of

VINCENT SERRANO,
Complainant,

v.

METROPOLITAN TRANSIT AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY,
Respondents.

Appearances:

Complainant Pro Se

For Respondents: Kavita K. Bhatt, Esq.

Before: Janice K. Bullard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the National Transit Systems Security Act of 2007, Pub. L. No. 100-53, § 1413, 121 Stat. 414 (codified at 6 U.S.C. § 1142 (West Supp. 2008)) (hereinafter "the Act" or "NTSSA"). The Act provides protection from discrimination to employees who report violations of federal law, rules, or regulations relating to transit safety or security; who report a hazardous safety or security condition; who refuse to work when confronted with a hazardous safety condition; or who refuse to authorize the use of any equipment in the belief that a hazardous safety condition exists. The pertinent provisions of the Act prohibit discharge, discipline, or any other discriminatory act against covered employees. This recommended decision and order is governed by those provisions, and the provisions of 29 C.F.R. Part 18.

I. Procedural Background

Vincent Serrano ("Complainant") has been employed with the Metropolitan Transit Authority/New York City Transit Authority ("Respondents") since 1991. On October 9, 2007, he filed a complaint with the New York State Department of Labor alleging that he had been

discriminated against for engaging in whistleblowing activities. On October 10, 2007, the complaint was referred to the Occupational Safety and Health Administration ("OSHA"). OSHA investigated the complaint and on February 28, 2008, issued the Secretary's Findings and Order recommending that the complaint be dismissed. OSHA concluded that Complainant did not establish that Respondents' actions were motivated by Complainant's protected activities.

On March 24, 2008, Complainant filed his objections to OSHA's findings in a letter to the Office of Administrative Law Judges ("OALJ"). The case was assigned to me, and by Order issued April 7, 2008, I scheduled a hearing in New York, New York for June 18, 2008. On that date, the parties appeared before me and presented testimony and argument. Respondents were represented by counsel, Kavita K. Bhatt, and Complainant acted on his own behalf. I admitted to the record documentary evidence, described and numbered herein, below.[1] I set September 12, 2008, as the deadline to submit closing arguments. The record in this matter was closed at the end of the hearing. Tr. at 79.

Complainant submitted his closing arguments on September 8, 2008. Counsel for Respondents contacted me on September 11, 2008, and asked for an extension of the filing deadline because she was experiencing computer problems. Complainant objected to the grant of any extension in a letter dated September 12, 2008. Respondents submitted its closing arguments by fax and mail on September 15, 2008, one business day late. I note that the Rules of Practice and Procedure Before OALJ, set forth at 29 C.F.R. part 18, direct administrative law judges to "closely limit the time within which the briefs for both parties shall be filed, so as to avoid unreasonable delay." 20 C.F.R. § 18.53. I find that a delay of one day is not unreasonable, particularly where Respondents gave notice and good cause for the delay. Therefore, I find it appropriate to overrule Complainant's objection to Respondents' late submission of closing arguments. Accordingly, I have considered the closing arguments of both parties.

II. Issues

The gravamen of this action is whether Respondents took adverse employment action against Complainant in response to protected activity by Complainant, in violation of 6 U.S.C. § 1142. In determining this, I must consider the following:

1. Whether the parties are subject to the Act.

2. Whether Complainant engaged in activity protected by the Act.

3. Whether Respondents took adverse employment action against Complainant.

4. Whether Respondents were aware that Complainant had engaged in protected activity.

5. Whether Respondents' actions were as a result of Complainant's protected activity.

[1] Respondent's exhibits are labeled and cited as "EX-__." My own exhibits are labeled "ALJ-__." References to the transcript are cited as "Tr. at __."

6. Whether Respondents' actions created a hostile work environment for Complainant.

III. Contentions of the Parties

Complainant contends that Respondents discriminated against him because he frequently raised safety concerns to his supervisors at job sites. This alleged discrimination took the form of assignment to alternate duties, particularly as a flagman; in an involuntary transfer to another "quarters" as Complainant's base location; and by failing to compensate him properly for additional time spent in transit as a result of said transfer.

Respondents assert that Complainant's assignment to flagging duties was (1) caused by Complainant's unrelated medical condition and attendant limitations, and (2) not an adverse employment action, because it was part of the regular duties of a trackman; that the transfer to another quarters was as a result of an unrelated disciplinary matter; and that there was no loss of pay because Complainant was properly compensated for his added travel time.

IV. Findings of Fact and Conclusions of Law

A. Summary of Evidence

1. Testimonial Evidence

Vincent Serrano (Complainant)

Complainant testified at the hearing before me on June 18, 2008. He is a trackman for Respondents, and is responsible for repair and maintenance of subway and elevated railroad tracks. Tr. at 17-18. He has worked for Respondents for 17 years (Tr. at 18) and has been an officer in the union that represents him and his fellow trackmen (Tr. at 72). Complainant typically works five days a week and occasionally works overtime. Tr. at 18. He was based in northern Manhattan during all of the events at issue in this adjudication, and generally works in that area or in the Bronx on elevated subway lines. Tr. at 21.

Complainant brought his complaint with OSHA because he feels he is being excluded from large repair jobs in order to prevent him from delaying work by complaining about safety issues. Tr. at 20. Instead, he is sent to smaller jobsites or assigned to work where he will not be able to identify as many safety concerns. Id. He frequently raises safety issues with the foreman wherever he is assigned. Tr. at 18, 20. His normal practice, following the guidelines set by Respondents, is to raise safety issues with the foreman and try to resolve them on the spot. Tr. at 19. If there is no resolution, he could ask for a Safety Rule Dispute Resolution Form (EX-6), which would require a more senior supervisor to immediately come to the work site to attempt to resolve the issue. Id. Complainant testified that he tries to avoid filing such forms, and prior to filing his complaint with OSHA , had never filed one other than at the foreman level. Tr. at 20.

As an example of the type of complaints that he has raised in the field, Complainant stated that he has reported that other workers fail to use required mats that are meant to protect them from the electric third rail that powers the subway system. Tr. at 24. When he sees workers in close proximity to a third rail, he will inform them and a foreman that a mat is needed. Id. He also has complained that tools used on the job were not properly maintained. Tr. at 27. Complainant testified that the individual responsible for tool maintenance was not qualified for that work. Id. In addition, Complainant has complained that a specific tool should be taken out of service. Tr. at 28.

During the course of a week, Complainant could work for five or six different foremen, depending on where he is assigned. Tr. at 21. His assignments come by telephone from a foreman. Id. Complainant testified that some of the foremen in his area prefer that he not be assigned to their jobs. Tr. at 22. Complainant stated, "[t]hat way you could get away with much more out in the field." Tr. at 23. Despite his safety concerns, Complainant sometimes does not report problems. He explained, "[s]ometimes I look the other way to let some things go, I'm conscious that something has to be done, work had to be completed." Tr. at 23. Complainant testified that foreman reacted differently to his complaints, with some making changes and some declining to do so. Tr. at 30-31. He stated:

> [H]alf of the times if [I] am with a Foreman that welcomes me because I keep his job safe and I have a lot of Foremen that prefer I go to their jobs but some foremen don't want me at their jobs so I get sent out to do something else…Some Foremen see me coming on the job and it's Oh man -- right away and I haven't said nothing but right away they see trouble.

Tr. at 72-73.

Complainant's chief complaint is that he is being assigned to flagman duties. A flagman protects other workers on an active track by serving as a lookout for trains. Typically, a flagman would walk with a track inspector, so the inspector can focus on spotting problems. Tr. at 25. All trackmen are trained to serve as flagmen. Tr. at 26-27. Flagmen are paid the same rate as other trackmen, although Complainant considers it easier than general track work. Tr. at 26. He stated that "[A] lot of people are happier to flag, I'm not one of them. . . . No, I like to see what I'm doing." Tr. at 26.

Complainant asserted that he is being assigned to flag duty more often than he should be. He has worked that duty approximately three times a week when other members of his gang are assigned to other work. Tr. at 25. Complainant could not recall exact dates when he had been a flagman. Tr. at 37. Foremen have discretion to choose who they want to go on flagging assignments. Tr. at 27. Complainant acknowledged that assignment to flag duty can be perceived as a reward (Tr. at 69), but Complainant saw his flagging assignments as punishment that subjected him to ridicule from co-workers. He stated: "[b]asically, I'm not a flaggy, I was doing more flagging than anybody else, when my own co-workers started telling me where's you skates and stuff like that?" Tr. at 32.

Complainant further explained his objections to flagging when I questioned him about it in the hearing. He said that he wants to share his experience and knowledge of safety risks with younger employees, who have not seen the injuries occur that he has during his career.

> MR. SERRANO: How is it punishing me? Because I can't protect the other people out there.
>
> JUDGE BULLARD: So you see that assignment as a flagman a failure to command -- failure to observe, recommend and authenticate your skill, is that where we are?
>
> MR. SERRANO: Yes, ma'am. I was trained as a track-man not as a walker.
>
> JUDGE BULLARD: You feel like you're being dissed –
>
> MR. SERRANO: Yes, ma'am -- no.
>
> JUDGE BULLARD: The common vernacular –
>
> MR. SERRANO: My seniority now, I could pick a trackwalker -- I could pick a trackwalker, which is all I do is walk and I have somebody flag for me. I could pick this kind of a job now, but it's not something, I believe, I like being out in the field, I like getting my hands dirty, I like being out there doing the work and everything else and make sure that everything [is] safe.

Tr. at 70. Complainant also specifically said that he is not interested in a supervisory position, however.

> 'Cause if I was a Foreman, I have to deal with the company, okay. Once you step -- once you get a Y-hat, it's a complete different league all together. You have to deal with the men okay, now you have to come and deal with managers and it becomes politics. Once you get a Y-hat, it's all political. It doesn't consist of the job anymore, it's all political.

Tr. at 72.

During the fall of 2007, Complainant was placed on restricted duty because of a medical condition that limited his work largely to flagging duties. On September 21, 2007, a doctor working for Respondents limited him to lifting no more than forty pounds, which is less than he typically carries at a job site. Tr. at 31-32, EX-4. As a result, Complainant spent parts of three months flagging or cleaning quarters.[2] Tr. at 31. Complainant conceded that with a forty-pound weight restriction, he could not work as a trackman because many of the necessary tools weighed fifty to eighty pounds. Tr. at 32. Complainant was restored to full duty on November 13, 2008.

[2] Serrano did not identify the dates during his testimony, but he was on restricted duty from September 21, 2007, until November 13, 2007. EX-4, 5.

EX-5. After the restrictions were lifted, he continued to be assigned flagging work, although he also received some regular assignments. Tr. at 32-33.

In addition, in the fall of 2007, Complainant was involuntarily transferred from the quarters at Dyckman Street to 215 Street, two stops from his usual quarters on the No. 1 line.[3] Tr. at 33. As a result of the added commuting time from his chosen work location, Complainant was paid for twenty minutes of travel time each day, based on Respondents' calculation that the trip between the two locations should take seven to ten minutes each time. Tr. at 34. Another employee who had to make the same trip at the end of the day to drop off internal mail was allowed thirty minutes for the trip, however. Id. Complainant mentioned this to a supervisor and was told that it would be addressed. Id.

James Natalizio

James Natalizio testified that he has been the superintendent of the subdivision in which Complainant works for seven years. Tr. at 38. He was previously both a level 1 and level 2 foreman. Tr. at 39. Mr. Natalizio knows Complainant, who is within his supervisory chain of command. Id.

Mr. Natalizio described the safety reporting procedure form that Complainant discussed. EX 6. Mr. Natalizio stated that if a worker and a foreman cannot come to an agreement about a safety issue, then a manager such as himself would come to the scene. Tr. at 40. That supervisor would examine the situation and make a decision regarding the complaint. Tr. at 41. Whenever there is a report of a safety problem, the foreman at the scene is required to stop all activity involving the complaint until it is resolved either by agreement, or by a higher level supervisor. Id. Even when the issue is resolved by agreement between a foreman and the complaining track worker, the form is supposed to be filed as a record. Tr. at 42. Mr. Natalizio said that this process, including the form, is relatively new, having been developed in negotiations with the union that represents track workers. Tr. at 43. He sees few of the forms; and at the time of the hearing had not had any safety dispute forms turned into him in several months. Id. Supervisors who fail to correct a safety problem could be subject to discipline. Tr. at 43.

Mr. Natalizio was aware of some of Complainant's grievances, but did not know of any that were written down and filed on the dispute forms. Tr. at 45. Mr. Natalizio recalled Complainant reporting unsafe and unsanitary conditions in one of the crew quarters, which lead to repairs being made. Id. He also recalled that there were other issues that he believed were generally resolved with foremen. Tr. at 46. Mr. Natalizio believed that all of Complainant's concerns were resolved. Tr. at 56.

Although Mr. Natalizio does not usually hear safety reports from first-line workers such as Complainant, he saw value in hearing such complaints, and did not discourage workers from bringing them to him. Tr. at 56-57. Mr. Natalizio testified that he did not consider Complainant

[3] Neither side provided evidence regarding the dates of the transfer. In its recommended findings, OSHA reported the transfer as lasting from September 19, 2007, until January 13, 2008. OSHA Letter to Vincent Serrano, Feb 28, 2008, at 2.

to be a troublemaker and he asserted that Complainant was welcome to raise safety concerns. Tr. at 67.

Track workers start their days by reporting to assigned quarters, which are selected based on seniority under provisions in the union contract. Tr. at 48-49. From the quarters, they are given daily work assignments, which generally are based on geography, keeping workers close to their quarters to avoid wasted travel time. Tr. at 47. Mr. Natalizio does not get directly involved in determining day-to-day assignments, which is the job of a level 2 foreman. Tr. at 51. The level 2 foreman communicates with level 1 foremen who are in the quarters and who can report which workers are available. Tr. at 51-52. Level 2 foremen and Mr. Natalizio would likely defer to the requests of a level 1 foreman for particular workers for a job. Tr. at 53.

Mr. Natalizio testified that Complainant was assigned to full-time flagging duty only while he was on restricted duty, because there were no other assignments available within his medical restrictions. Tr. at 46. Mr. Natalizio contended that once Complainant was healed, he was given the same range of assignments as any other employee. Tr. at 47. Mr. Natalizio agreed that a flagman probably has fewer opportunities to raise safety issues, but he maintained that flagmen have a large safety role because they guard other workers. Tr. at 53. In response to my question regarding whether a foreman would benefit by selecting a known complainer as flagman, Mr. Natalizio testified:

> If the Foreman wants -- a flagman's protection is his life. A flagman's watching out for trains, he's got a very important job. If anything he probably has more of a safety [role] than anybody on our on-going large job, because he is actually totally responsible for that Foreman or that track inspector for his life. He's flagging for him. He's his eyes, his ears 150 feet in front of him when he's walking track. So he holds, probably one of the most important safety jobs as a flagman.

Tr. at 53-54.

Mr. Natalizio said that Complainant was involuntarily transferred from Dyckman Quarters to 215 Street pending investigation of a dispute between Complainant and a coworker. Tr. at 48. Mr. Natalizio testified that "there was charges of physical contact and abuse and harassment so we immediately had to separate the parties…" Id. Mr. Natalizio observed that the other employee had stated that he was fearful for his life. Tr. at 50. Respondents' personnel office directed Mr. Natalizio to move Complainant, rather than the other employee involved. Tr. at 48-49. Mr. Natalizio said he did not know why Complainant was chosen as the individual to be transferred. Tr. at 50. He testified, "I don't know how policy compliance or Labor Relations decides that. I'm just sent a letter or an e-mail saying to separate the parties and to move so-and-so to another location." Id.

Mr. Natalizio testified that under the union contract, when employees are forced to change quarters, they must be paid for their additional travel time. Tr. at 50. Complainant was transferred to the quarters at 215 Street because that was the closest location to his regular quarters at Dyckman. Tr. at 48. Complainant was paid ten minutes each way for the added

commuting time, based on the amount of time it took to travel from one station to another on the train. Tr. at 49.

2. Documentary Evidence

At the hearing on June 18, 2008, Complainant did not present any documentary evidence. Tr. at 8. Respondents presented six exhibits, which I admitted and numbered EX-1 through EX-6. Tr. at 9-11, 40. The exhibits are summarized here.

EX-1: A photocopy of Complainant's initial complaint with OSHA.

EX-2: Memorandum of understanding between Respondents and Transit Workers Local Union 100 regarding safety procedures.

EX-3: Policy/Instruction regarding safety issued by Respondents on June 7, 2007.

EX-4: Physician's report from September 21, 2007, by which Respondents' physician placed Complainant on restricted work.

EX-5: Physician's report from November 13, 2007, by which Respondents' physician restored Complainant to full duty.

EX-6: Blank copy of safety rule dispute form.

3. Post hearing evidence

In his post-hearing brief, Complainant related additional facts regarding this matter. Complainant addressed his involuntary transfer, stating that the 215th Street quarters is partially isolated from other employees, and does not always have on-site supervision. Compl. Brief at 2. Also, he asserted that he was assigned to flagman duties before he went onto restricted duty status on September 21, 2007. Comp. Brief at 3.

The rules governing Administrative Law Judge proceedings allow only narrow circumstances for the admission of evidence once the record has been closed. Under 18 C.F.R. § 18.54(a), the record in a matter is considered closed after the hearing unless the administrative law judge directs otherwise. I closed the record at the end of the hearing on this matter on June 18, 2008. Tr. at 79. Before I did that I specifically asked Complainant if he had any facts to add, and he declined. Tr. at 77. After the record is closed, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing for the record." Id. § 1854(c). The "new and material" requirement has been interpreted to exclude evidence that could have been offered at the time of the hearing, and which a party was aware of at that time. Masek v. The Cadle Co., ARB No.97-069, ALJ No. 1995-WPC-1, elec. op. at 9-10 (ARB Apr. 25, 2000).

Because Complainant was transferred before he filed his OSHA complaint, and therefore was aware of conditions at the 215th Street quarters at the time of the hearing, his assertions constitute post-hearing evidence. However, I find that Respondents are not prejudiced by its admission to the record. Respondents did not object to the introduction of this evidence. I note that Complainant submitted his closing arguments well before Respondents, and therefore, Respondents could have addressed his contentions. In addition, considering Complainant's *pro se* status, I find it appropriate to allow him some latitude in what I perceive to be a procedural issue.

B. Statement of the Law

The Act protects individuals who report safety or security problems occurring within public transit systems, or who prevent some aspect of system operations while acting in good faith to prevent a hazardous safety or security condition. 6 U.S.C. § 1142(a)-(b). Employees are protected where they report a hazardous safety condition, refuse to work when confronted with such a condition, or refuse to authorize the use of equipment or structures for the same reason. Id. § 1142(b)(1). Whistleblowers who believe that they have been discriminated against for their conduct may file complaints with the Secretary of Labor through OSHA. If the employee or the employer disagrees with OSHA's findings, either may request a hearing on the record before an administrative law judge with OALJ.

The burdens of proof that apply to allegations of discrimination under Title VII of the Civil Rights Act of 1964 have been adapted to the determination of whether violations of whistleblower protections have occurred. McDonnell Douglas Corp. v. Green, 411 .S. 792 (1973). Accordingly, whistleblowing employees are required to show that they engaged in protected activity, that there was an adverse employment action taken against them, that their employer knew they engaged in protected activity, and that there was a relationship between the adverse action and the employer's knowledge of the protected activity.

Under the McDonnell-Douglas framework, the complainant has the initial burden of establishing a prima facie case of retaliation. By establishing a prima facie case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, supra. In instances where a full hearing has been held, there is no need to determine whether the employee presented a *prima facie* case and whether the employer rebutted that showing. United States Postal Service Board of Governors v. Aikens, 460 U.S. 709, 713-14 (1983); Pike v. Public Storage Companies, Inc., 98-STA-35 (ARB July 8, 1998). The focus of inquiry should be whether the respondent establishes a nondiscriminatory justification for the adverse employment action. Carroll v. J.B. Hunt Transportation, 91- STA-17 (Sec'y June 23, 1992). However, where Complainant at hearing fails to demonstrate protected activity or adverse action, then he has failed to establish a prima facie case and dismissal is appropriate. Smith v. Sysco Foods of Baltimore, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004).

Respondents bear a burden of production to articulate a legitimate, nondiscriminatory reason for their employment decision. Mc-Donnell Douglas Corp. v. Green, supra. The respondent need only articulate a legitimate reason for its action. St. Mary's Honor Center v.

Hicks, 509 U.S. 502 (1993). If the respondent's reason rebuts the inference of retaliation, then a complainant must demonstrate by a preponderance of the evidence that the stated legitimate reasons for the adverse action were a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra at 2752-56. In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id. However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

In their closing argument, Respondents contended that Complainant failed to establish a prima facie case of discrimination. Resp. Brief at 3-5. Respondents argued that Complainant did not engage in protected activity and that Respondents had no knowledge of said activity. Respondents further contend that there was no adverse employment action, that if there was such an action, whatever protected activity occurred was not a contributing factor in the decision. Respondents further stated that they have presented clear and convincing evidence of a nondiscriminatory motive.

Since I held a hearing in this matter, I need not consider whether Complainant established a prima facie case, but rather I shall focus on "whether the complainant has shown that the reason for the adverse action was his protected safety complaints." Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 999). In addition, as Complainant has proceeded without the advice of counsel, his claims and testimony will be liberally construed in accordance with precedents in *pro se* whistleblower cases. See, e.g., Coxen v. United Parcel Service, ARB No. 04-093, ALJ No. 2003-STA-13 (ARB Feb. 28, 2006). Although a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the complainant must still carry the burden of proving the necessary elements of retaliation. Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991).

C. Discussion

1. Whether the Parties are Subject to the Act

The Act protects employees of public transportation agencies. 6 U.S.C. § 1142(a)-(b). Respondents do not dispute that Complainant is its employee, or that it falls under the definition of "public transportation agency." See 6 U.S.C. § 1131(5) (defining term as "publicly owned operator of public transportation eligible to receive federal assistance"). As such, I find that the parties are subject to the Act.

2. Protected Activity

Subsection (b)(1)(A) of the Act identifies "reporting a hazardous safety or security condition" among protected activities. Respondents argue that Complainant has not met his

burden in this area because "he himself is incredibly vague about the details of his alleged safety complaints." Resp. Brief at 3. Respondents stated that Complainant did not alert supervisors to his complaints, cited no specific dates on which complaints occurred, and with few exceptions, did not recount the details of any complaints. Id. I find that the record indicates otherwise. Complainant testified that he constantly complained about safety issues to various supervisors. Tr. at 18-20. Respondents' own witness, James Natalizio, testified that Complainant frequently raised safety concerns to him and to other supervisors. Tr. at 45-46, 56. The fact that Complainant did not use the forms available to file a formal report is less important than the fact that he did raise safety concerns with supervisors, particularly where, as is the case here, he did so habitually. Whether Complainant could identify the date on which he raised complaints would relate more directly to whether his complaint with OSHA was timely filed and whether the adverse action was temporally related to the complaint. Accordingly, I find that Complainant has proven by a preponderance of the evidence that he engaged in protected activity.

3. Adverse Employment Action

Under the Act, employers are not to "discharge, demote, suspend, reprimand, or in any other way discriminate" on the basis of protected activity. § 1142(b)(1). It has been determined that an adverse action occurs when complainant has shown that he suffered a "tangible job consequence". Shelton v. Oak Ridge Nat'l Labs, ARB No. 980100, ALJ No. 980CAA-19, slip op. at 8. (ARB March. 30, 2001), citing Oest v. Illinois Dep't of Corrections, 240 F.3d605, 612-613 (7th Cir. 2001). Complainant identifies three potential adverse employment actions: assignment to flagman duties, an involuntary transfer, and failure to pay for added commuting time. I will address each in turn.

Assignment to Flagman Duties

Complainant argues that he was punished for complaining about safety by being assigned to be a flagman more often than he should have been. Complainant considered this adverse to him, because he wanted to work on track maintenance. He concedes that flagging falls within the duties of a trackman. Tr. at 26-27. Respondents argue that "assignment to a regular part of a trackworker's duties cannot be deemed an adverse employment action." Resp. Brief at 4. The law does not support that contention. The Supreme Court has held that assignment to different duties within the same job classification as retaliation can be an adverse employment activity. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 70-71 (2006). The key consideration in evaluating a job reassignment is whether the new duties constitute material adversity, regardless of whether there is a change in titles. In looking for material adversity, courts should focus on "those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." Id. at 70.

In Burlington Northern, the plaintiff (White) was assigned within the same job classification from operating a forklift to working on a railroad track gang. The Supreme Court found that such a transfer was materially adverse based on the specific circumstances of the transfer. White had previously complained about sexual harassment, which resulted in the discipline of a supervisor. She was the only woman working in any job on the track gang, and her male coworkers had complained about the fact that she had been assigned to run the forklift.

Forklift operators needed additional qualifications (an indicator of prestige), and working as a track laborer was more physically arduous. Moreover, forklift operator was objectively considered to be a better job than track laborer among the people who worked at that workplace. For those reasons, the Court found that transferring White away from the forklift was materially adverse. Id. at 71.

Complainant has not proved by a preponderance of evidence that flagman duties are worse than working on track repairs. Both assignments fall within the same job classification and pay grade. Both are considered part of a trackman's duties. Furthermore, one job is not objectively worse than the other. Complainant concedes that some trackmen prefer to flag. Tr. at 26. This is supported by his statement that with his seventeen years of seniority, he would be able to select flagging or track walking positions should he choose to do so. Tr. at 70. The fact that Complainant prefers to perform heavy maintenance and was (on an unspecified occasion) teased for flagging more often does not make such an assignment an adverse employment action.

The Involuntary Transfer

It is undisputed that Complainant was involuntarily transferred to a work site located about ten minutes from his chosen site. Complainant perceived this as an adverse employment action in retaliation for his complaints. Respondents did not bother to address this transfer in its brief. It is clear that an involuntary transfer could constitute an adverse employment action, even when it is made within the same job classification. The assignment of a whistleblowing pilot to early morning flights from a remote airport was considered an adverse retaliatory transfer. Negron v. Vieques Air Link, Inc., ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 7-8 (ARB Dec. 30, 2004). The pilot's requests for travel assistance to his newly assigned location were ignored, and he was then fired for failing to report to the new work site. Id. at 3-4. Because the employing airline could not demonstrate any particular need for that flight to be scheduled, the employer's actions were deemed to be retaliatory. Id. at 8. Such an onerous transfer was likely to dissuade the employee and fellow employees from reporting safety violations in the future.

In the instant matter, Complainant's transfer to a location only ten minutes away from his regular work site is not analogous to the transfer at issue in the Negron case. Nevertheless, the transfer could constitute an adverse employment action, as it affected Complainant's work circumstances. Complainant contends that the transfer was made to isolate him from other employees. He notes that in the new quarters "I was partially isolated from other employees and . . . there was no supervision in certain days of the week." Compl. Brief at 2. Moreover, the transfer took away an aspect of his seniority rights in the union—the right to choose his work location. It is possible that the combined penalties described would have the effect of discouraging an employee from speaking out about safety. Accordingly, I find that the involuntary transfer is an adverse employment action.

Loss of supplemental pay related to the transfer

Loss of supplemental pay is an adverse employment action. See Long v. Roadway Express, Inc., 88-STA-31, elec. op. at 4-5 (Sec'y Sept. 15, 1989) (ruling that employer's failure to pay truckers for "delay time" when stranded in bad weather was adverse action). However, I

find that no such loss occurred here. The record does not support Complainant's contention that he was denied fair pay for his added travel time following the involuntary transfer. Complainant was paid for an extra ten minutes of travel each way. Tr. at 34. The travel time between the two locations was estimated to take from seven to ten minutes. Id. I also take notice of the fact that according to Respondents' published schedule, the No. 1 Subway operates every four to six minutes during Complainant's working hours, and that the scheduled travel time between the stations is three minutes. Therefore, I find that the record demonstrates that Complainant was paid for the additional time incurred by his transfer.

I give no merit to Complainant's argument that another employee was paid differently to make the same trip. The record reflects that the other employee was not merely commuting, but was delivering mail. Tr. at 34. Complainant failed to name the other employee, or provide any other evidence demonstrating how that individual was similarly situated, but paid more.

4. Employer's Knowledge of Protected Activity

Complainant must prove by a preponderance of the evidence that those responsible for adverse action against him were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91 STA-10 (Sec'y Jan. 27, 1992). Despite Respondents' assertions, I find that Complainant has established that his supervisors were aware of his protected activity. James Natalizio testified that he was aware that Complainant regularly reported hazardous safety conditions, including to him personally. Tr. at 45-46, 56. Natalizio was a supervisor responsible for track maintenance across a wide area of the transit system. Tr. at 38. Complainant also reported safety concerns to several other foremen, Tr. at 18, 20, 46, 55, and Natalizio was aware of at least some of these reports as well. Tr. at 46, 55. Accordingly, I find that Respondents were aware of the protected activity. Mr. Natalizio was also involved in Complainant's involuntary transfer. Although Natalizio testified that he was directed by Respondents' personnel office to move Complainant, he obviously was the company official with the authority to implement that instruction. Accordingly, I find that Complainant has established this element of his case.

5. Protected Activity as a Contributing Factor to Adverse Employment Action

I have found that Complainant's assignment to flagging duties and the amount of pay he was given for commuting do not constitute adverse employment actions. Even if I were to determine that the assignment and pay issues were adverse actions, the record fails to demonstrate any nexus between the transfer and commuting costs and Complainant's protected activity. Complainant has offered no evidence of animus between him and his supervisors, and relies upon his belief that some supervisors prefer that he not work on their jobs. Tr. at 72-73. Complainant has suggested that his diligence regarding safety issues can present an obstacle to getting jobs done, thereby motivating some foremen to relegate him to flagging duties. I accord weight to his assertion, and agree that the desire of supervisors to avoid a complainant's safety complaints might demonstrate discriminatory intent. However, I note that Complainant also testified that some supervisors like him to work with them. I further find that Complainant's assignment to flagman was motivated at least part of the time by his medical restrictions. The

record does not support a finding that Complainant's assignments to flagman were adverse actions. In addition, because Complainant was unable to identify any specific date on which he raised safety complaints, Complainant is unable to establish a temporal inference between his protected activity and his assignment to flagging. Accordingly, Complainant has not met his burden of proof with respect to how being assigned flagging duties constitutes an adverse action. Complainant further has not demonstrated any relationship between protected activity and the decision to pay him for ten minutes of time for each leg of his commute to his reassigned work site.

I have found that the involuntary transfer itself represents an adverse employment action. However, I find that Complainant has failed to meet his burden of establishing that Respondents transferred him in retaliation for his protected activity. Complainant has not demonstrated a temporal relationship between the transfer and protected activity so as to create an inference of discrimination. Complainant offered no evidence suggesting a retaliatory motive for that action. Complainant has argued that by isolating him from other workers, Respondents were limiting his ability to raise safety complaints. However, I find it objectively reasonable that Complainant was isolated in response to an altercation with another employee. Moreover, in his objections to OSHA's findings, Complainant acknowledged that the transfer occurred as the result of a personality conflict, rather than a safety-related dispute. Complainant wrote:

> [T]he junior man is the one observing an inappropriate conduct and physically provoking me. The gang supervisor, has failed to discipline the junior man for his provocation and other inappropriate actions . . . . He has opted to give a "blind eye" to the situation due to the fact that they share the same religious affiliation . . . . The foreman and this junior trackman, consistently subject everyone in the quarters to listening to their religious discourses.

Compl. Objections to OSHA Findings (March 24, 2008).

6. Legitimate Business Reason for Transfer

Even assuming, arguendo, that the adverse action was related to Complainant's protected activity, I find that Respondents have met their burden of production and have articulated a legitimate business reason for Complainant's transfer. Respondents' witness, James Natalizio, explained that Complainant was moved because of a fight between Complainant and a co-worker. Tr. at 48. Complainant's own statements support that contention. Respondents moved Complainant to a station near his regular work site, and compensated him for the additional time incurred by commuting to the new site. I accord weight to this explanation, and find that Respondents have articulated a legitimate business reason for transferring Complainant. Complainant has offered no evidence demonstrating that Respondents' stated reason for the transfer was pretext for discrimination. Accordingly, I find that Respondents did not take adverse action against Complainant in violation of the Act.

7. Whether a Hostile Work Environment Existed

Pursuant to the findings of Coxen, supra, I have liberally construed the Complainant's testimony and pleadings to consider theories not actually argued. Complainant's assertions imply a complaint of being subjected to a hostile work environment as a result of reporting safety violations. A hostile work environment can arise when an employee engages in protected activity and his employer retaliates by ordering or allowing harassment of the worker by supervisors or coworkers. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). However, such conduct must be extremely serious or serious and pervasive. As the Administrative Review Board observed,

> Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable. Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998). Under [a hostile environment] theory of recovery, a complainant is required to prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant...Circumstances germane to gauging a work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."

Sasse v. Office of the U.S. Attorney, USDOJ, ARB No. 02-077, ALJ No. 1998-CAA-7, elec. op. at 22 (ARB Jan. 30, 2004) (quoting Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, elec. op. at 16-17, 21-22 (ARB Feb. 29, 2000)). An employer is liable for harassing conduct of coworkers or supervisors where the employer knew or should have known of it and failed to take prompt remedial action. Id.

In this case, Complainant alleged that he was subjected to harassing acts that suggested a claim of hostile work environment. His co-workers apparently teased him about being a "flaggy" (Tr. at 32); his reassigned quarters were not properly supervised (Compl. Brief at 2); and he believed that he was labeled as a troublemaker by supervisors and coworkers (Tr. at 73). I find that these acts do not establish the existence of a hostile work environment. Even taken together, the circumstances that Complainant described do not meet "the high bar for a hostile work environment claim." Sasse, supra. at 23. Complainant's contentions are not corroborated by any other evidence, and in fact, Mr. Natalizio testified that he did not believe that Complainant was a troublemaker. Tr. at 67. Complainant has not established that he was subjected to harassment that was so severe or pervasive as to alter the terms and conditions of his working environment. Accordingly, I find that Complainant cannot prove by a preponderance of evidence the existence of a hostile work environment.

V. Conclusion

Because Complainant has not demonstrated a nexus between any protected activity in which he engaged and any adverse employment action that the Respondents took, I find that Complainant is not entitled to the relief he seeks under the Act.

RECOMMENDED ORDER

It is hereby recommended that the case of Complainant VINCENT SERRANO, be DISMISSED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF REVIEW: Review of this Recommended Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c. (43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the National Transit Systems Security Act of 2007. Accordingly, this Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington, DC 20210. See generally 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.